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Nos. 00-1751, 00-1777, 00-1779

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
Of Public Instruction, et al.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, et al.,
Respondents.

**On Writ of Certiorari to the
Untied States Court of Appeals for the Sixth Circuit**

AMICUS BRIEF OF OHIO ASSOCIATION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF AFFIRMANCE FOR RESPONDENTS

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INTEREST OF AMICUS CURIAE

A group of Ohio citizens organized in 1958, dedicated to the public support of public education. During 1979, this group became affiliated with the National Association for Public Education and Religious Liberty and became the Ohio Association for Public Education and Religious Liberty (OPEARL).[1]

OPEARL is committed to the maintenance and support of a system of free, public education throughout the United States of America, extending from the kindergarten through the university. Public education was established and provided for all American children, OPEARL submits, primarily to create an enlightened United States electorate to rule itself democratically. The success of the American democratic system rests on completely supporting and maintaining the unique principle of its free kindergarten through twelfth grade (K-12) public education system.

Because its is profoundly dedicated to the United States K-12 free public school education system, OPEARL resists any attempt to expend public funds for the support of nonpublic sectarian and nonsectarian K-12 schools. This Association believes that any child will benefit just as much in a publicly supported, publicly controlled school system as she/he will in a nonpublic school. However, the essential difference is that the former is controlled by the public and responsive to public policies while the latter is controlled and responsive to a limited private group. Therefore, OPEARL

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[1]Counsel of Record of OPEARL is the author of this amicus brief. No monetary contributions were made for the preparation or submission of this amicus brief, except for the payment of the agreed legal fee and related expenses to the author by his client, OPEARL. Supreme Court Rule 37.6. Consent letters for OPEARL's amicus brief, signed by each of the five parties, is on file with the Clerk of this Court.

ardently contends that the sharing of public funds with nonpublic sectarian and nonsectarian schools results in a dilution of the strength of the vital American K-12 public school system.

OPEARL believes that each parent also has the freedom of choice to decide whether or not she/he wishes to have her/his child participate in America's free K-12, public school education. If a parent chooses a nonpublic school education for her/his child, then the parent must assume full responsibility, including the monetary resources, for providing the alternative K-12 education for her/his child. Public funds used for the support of nonpublic education results in taxation without representation.

Further, OPEARL adheres to the Establishment Clause, contained in the First Amendment to the United States Constitution,[2] in connection with public monies expended or received by nonpublic sectarian K-12 schools. For that reason, OPEARL has an interest in supporting the instant Respondents and for advocating the United States Supreme Court to affirm the judgment of the two lower courts that held and ruled that the statutory Ohio Pilot Project Scholarship Program, also known as the "school voucher program," is unconstitutional because it violates the Establishment Clause in the First Amendment.[3] The Ohio Legislature enacted the school voucher program in question on June 29, 1999.

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[2] The First Amendment, which address freedom of religion, states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

[3] The Establishment Clause to the First Amendment was made applicable to the states through the Fourteenth Amendment to the United States Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940).

In accordance with Supreme Court Rule 37.1, OPEARL, by its amicus brief and public records in its filed Lodging, wishes to bring to the Supreme Court's attention what it submits is "...relevant matter not already brought to its attention by the parties (that) may be of considerable help to the Court[,]"[4] on the important issue of whether or not the public aid provided through the Scholarship Program Ohio statutes in question creates an excessive entanglement between the State of Ohio's government and religion, primarily Roman Catholic religion in the instant cases. See *Mitchell v. Helms*, 530 U.S. 793, at 845, 120 S.Ct. 2530, at 2560 (2000) (O'Connor, J., concurring).

SUMMARY OF ARGUMENT

The statutory Ohio Pilot Project Scholarship Program, also known as the "school voucher program," enacted on June 29, 1999 by the Ohio Legislature, does not pass "...constitutional muster under this Court's Establishment Clause jurisprudence[,]"[5] because the result of the school voucher program has the effect of an endorsement of religion, thereby failing the second prong in the *Lemon* Test. *Lemon v. Kurtzman*, 403 U.S. 602, at 612-13, 91. S.Ct. 2125 at 2131 (1971).

OPEARL contends that this Ohio school voucher program also fails the third prong of the *Lemon* Test for the reason that the process involved in the enactment of the statutory Ohio Pilot Project Scholarship Program created an excessive entanglement between government and religion. The Ohio public records, such as filed in the Lodging of OPEARL, compellingly demonstrate that the state executive and legislative branches of Ohio's government were

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[4] Supreme Court Rule 37. 1.

[5] Page 13 of BRIEF OF STATE PETITIONERS, filed on November 9, 2001, in the instant cases.

excessively entangled with the Roman Catholic Church in the legislative process before, during and after the legislative and executive enactment into law of this Ohio school voucher program under review by this Court.

Therefore, both the important institutions of religion and democratic government will be weakened and become susceptible to corruption in this country if the Ohio school voucher program is not declared unconstitutional by this Court for the reason that the voucher program is in violation of the Establishment Clause in the First Amendment to the United States Constitution, which is applicable herein through the Fourteenth Amendment to the Constitution.

ARGUMENT

The "scholarships" are commonly referred to as "school vouchers" that are awarded pursuant to the statutory Ohio Pilot Project Scholarship Program (Scholarship Program). School "choice" through the use of vouchers is not a novel idea. In fact, economist Milton Friedman proposed the idea in the 1950s as a way to create a free market in the education system. The idea did not take hold at that time; however, some elected state executives and legislatures have resurrected Friedman's idea, even as legislatures, like Ohio,[6] have failed to constitutionally fund state constitutional public school systems. To assist this Court, OPEARL has included as part of its Lodging a copy of an article, published in 1997 by the Ohio Coalition for Equity and Adequacy of School Funding, that briefly discusses the history of school vouchers through 1997.[7]

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[6] See, *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733; *DeRolph v. State* (2000), 89 Ohio St.3d. 1, 728 N.E.2d 993.

[7] "The Buckeye Institute's Proposed School Voucher Plan: Who Wins? Who Loses?" published in December 1997 by the Ohio Coalition for Equity & Adequacy of School Funding.

The leading case interpreting the Establishment Clause to the First Amendment of the United States Constitution in the context of public funds and sectarian schools is *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The resultant constitutional standard is embodied in what is commonly known as the "*Lemon* Test." The *Lemon* Test has three prongs, and if a statute fails to pass the bar under any of the three, it is unconstitutional. The first prong requires that a law reflect a secular legislative purpose and the third prong requires that a law avoid excessive government entanglement with religions. The second prong of the *Lemon* Test requires that a law's primary effect neither advances nor inhibits religion. *Lemon*, Id. at 612-613.

The second prong is implicated by the facts in the instant cases. Recognizing the congressional intent that is ostensibly unobjectionable can mask a law with unconstitutional effect, this Court has held that it may be necessary to probe the text to the effect of an enactment. In *Committee for Public Education v. Nyquist*, 413 U.S. 756, at 774 (1973), this Court held that "the propriety of a legislature's purposes may not immunize from further scrutiny a law which [has] a primary effect that advances religion ..." This principle is particularly well suited for application to the facts of the present cases. On its face, this Scholarship Program appears to survive under the second prong of the *Lemon* Test by neither advancing nor inhibiting religion. Reading the Ohio statutes in question, it appears that the Scholarship Program participants are able to choose from a wide variety of schools, including public, private sectarian and private nonsectarian. However, in effect, only private, primarily private sectarian, schools have chosen to participate.[8] This effect is plain in hindsight. Moreover, the

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[8] Page 7 of BRIEF OF STATE PETITIONERS, filed on November 9, 2001, in the instant cases, states in pertinent part: "For the 1999-2000

facts indicate that the drafters' intent was not so pure as the text of the Ohio statutes in question seem to indicate. Notwithstanding drafting clearly intended to evoke a perception of constitutional compliance, the result, i. e., the effect, of these statutes was surely both apparent to and intended by the Ohio lawmakers.

The Ohio statutes that govern the Scholarship Program appear to allow the participants, i. e., the students, and their parents to choose among a variety of public, private sectarian and private nonsectarian schools when deciding where to spend the public scholarship money provided by the State of Ohio. Yet the record establishes for the instant cases that none of the statutorily eligible sixteen Ohio public school districts adjacent to the Cleveland City School District has chosen to participate in the Scholarship Program.[9]

Although the Ohio statutes governing the creation and operation of the Scholarship Program appear to provide the neutrality demanded by the Federal Establishment Clause, it is apparent that more than a mere cold reading is required when applying the *Nyquist* principle. Sectarian schools comprise 82 percent of the total schools participating in the Scholarship Program, but 96 percent of all the participating students are enrolled in the registered religious schools. Further, the State of Ohio provides this public tuition for these 96 percent sectarian scholarship recipients without any restrictions whatsoever that these particular public funds be used for only secular instruction. Such an unrestricted flow of public money into the coffers of the religious schools can

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school year (on which the District Court record was based), parents from among 56 participating schools, 46 of which (82 percent) were religiously affiliated. *Simmons-Harris*, 234 F.3d at 949 (State Pet. App. At 5a). In that same year, 96 percent of all scholarship students attended one of these 46 religiously affiliated schools, which included Catholic,..."

[9] Page 6 of BRIEF OF STATE PETITIONERS, filed on November 9, 2001, in the instant cases.

certainly be said to advance religion by the Ohio government. Because of this, the *Nyquist* Court has afforded us the opportunity to look behind the face of the Ohio statutes and discern what has really transpired.

The Scholarship Program does not simply direct public monetary funds to nonpublic sectarian schools, but it does so in a manner contrary to the policy of the Establishment Clause. In the operation of the Scholarship Program, the public funds are nakedly commingled with the private funds of the participating religious schools. There is absolutely no statutory regulation of the uses to which these public funds can be expended; they are simply injected, **carte blanche**, into the coffers of the religious schools. The inevitable result of this commingling is that public funds are being used to advance religion. It is clear that this practice manifests a blatant disregard for the fundamental policy underlying the Establishment Clause, viz., that the government must remain unquestionably impartial on matters of religion.

When a Scholarship Program recipient attends a registered private school, the State of Ohio delivers its check, payable to the recipient's parents, directly to the private school. The parents then must endorse the State's check to the registered private school without the State's check ever leaving the custody of the private school. Of course, the record supports that most of these public checks are delivered to private religious schools by the State of Ohio.

In *Nyquist*, this Court held that tuition reimbursements to parents of children attending nonpublic religious schools violated the Establishment Clause. This Court made the following statements in *Nyquist*, Id. 413 U.S. at 788-789, holding that said state tuition reimbursements were unconstitutional.

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that this law aids only "low-income parents", and without state assistance their right to have their children educated in religious environment "is diminished or even denied." It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," and notwithstanding the "high social importance" of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted [sic]. [Footnotes and citations omitted.]

The school voucher payments have the unmistakable effect of providing direct financial assistance and support to the participating religious schools because, by statute, the Ohio school voucher checks are endorsed and deposited directly into the participating Ohio sectarian schools' checking accounts without any restrictions regarding which functions those public funds may support. This practice is manifestly more objectionable than that disallowed by this Court in *Nyquist*. Therefore, the Scholarship Program is unconstitutional because it fails the second prong of the *Lemon* Test, i. e., through this Scholarship Program the State of Ohio is directly funding the advancement of religion.

OPEARL wishes to emphasize that this Court's June 23, 1997, decision in *Agostini v. Felton*, 117 S.Ct. 1997 (1997), does not overrule *Nyquist*. *Agostini* involved a program through which the New York City Board of Education placed its own paid public school teachers in New York City parochial schools to provide secular remedial education to disadvantaged children as mandated by Title 1 of the Elementary and Secondary Education Act of 1965, as amended. No public funds were or are deposited into the coffers of the participating New York City parochial schools for providing this secular remedial education by public school teachers in those parochial schools' classrooms. This Court held in *Agostini* that the remedial instructional program implemented on a neutral basis by the New York City Board of Education does not violate the Establishment Clause. Accordingly, the decision in *Agostini* does not support the argument that the Scholarship Program is constitutional when tested against the Establishment Clause in the First Amendment to the United States Constitution.

Focusing the *Lemon* Test's third prong for the Establishment Clause on this statutory Ohio Scholarship Program, viz., whether or not government entanglement with

religion is excessive, this Court made the following statements in *Lemon v. Kurtzman*, 403 U.S. 602, (1971), at 615:

> Here we examine the form of the relationship for the light that it casts on the substance.
>
> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.

In considering and applying this third prong of the *Lemon* Test, OPEARL wishes to direct this Court's attention to the Affidavit of Douglas Edward McCabe (Curator McCabe), which is contained in the Lodging that OPEARL has filed in these cases with the Clerk of this Court. Curator McCabe states in his Affidavit that he serves in the capacity as Curator of Manuscripts and Archivist for the George Victor Voinovich Collection and began serving in that capacity during August 1998.[10] George Victor Voinovich was elected for four-year terms as Governor of Ohio in 1990 and 1994 and served as the State of Ohio's chief executive from January 13, 1991, through December 31, 1998. Curator McCabe has custody of the public records of the Governor's Office from the George Voinovich administration from 1991 to 1999 by reason of the State Government Records Deposit Agreement, in accordance with the Ohio laws, executed between the Ohio Historical Society and The Ohio

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[10] See Affidavit of Curator McCabe and his Vita on Pages 5 through 12 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

University.[11] Curator McCabe identifies twenty-one separate public records from the files of the administration of Governor George Voinovich (Gov. Voinovich), stating that each is a true copy of the copy on file at the library of The Ohio University, which copies are part of OPEARL's Lodging filed in these cases at the Clerk of this Court.[12]

Some of these public records are mentioned and referred to as sources in two investigative news articles reported by two news reporters, Douglas Oplinger and Dennis James Willard, which were published in the December 14, 1999, edition of the Akron (Ohio) Beacon Journal. These two news stories have the bold captions of "**Voucher system falls short of goals**" and "**Voucher plan leaves long list of broken vows,**" respectively.[13] These articles were part of the Beacon Journal's public-policy investigative series -- entitled "**Whose Choice?**" -- which series was published in its newspaper from December 12, 1999, through December 15, 1999.[14]

OPEARL wishes to direct this Court's attention in this amicus curiae's Lodging to the content of each of these twenty-one public records, covering the period of time from April 18, 1991, to January 21, 1998. OPEARL submits that these public records manifest and prove excessive government entanglement with religion relative to the enactment and administration of the statutory Ohio

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[11] See STATE GOVERNMENT RECORDS DEPOSIT AGREEMENT and its Appendix A on Pages 13 through 28 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[12] See Pages 29 through 70 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[13] See Pages 71 through 83 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[14] See Pages 84 and 85 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

Scholarship Program, a clear violation of the Federal Establishment Clause. In support of respectfully soliciting this Court to carefully review and consider each of these identified twenty-one public records, OPEARL notes the following sentences in Justice O'Connor's concurring opinion in *Mitchell v. Helms*, 530 U.S. 793, at 844, 120 S.Ct. 2530 at 2560 (2000).

> Our school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule. As I explained in *Rosenberger*, "[r]esolution instead depends on the hard task of judging–sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." 515 U.S., at 847, 115 S.Ct. 2510 (concurring opinion).

OPEARL urges this Court to also apply careful and thorough scrutiny when considering the excessive government entanglement with religion principle in school-aid cases, such as the ones at bar. Accordingly, this amicus curiae respectfully advocates that the members of this Court follow Justice O'Connor's above pronouncement and begin to sift and judge through the content of each of the twenty-one public records in the Lodging filed by OPEARL. At the conclusion of this close examination process, OPEARL submits that this Court will determine and rule that this challenged statutory Ohio Scholarship Program does indeed offend the Establishment Clause in the First Amendment to the United States Constitution.

Within a few months after he began his first term in office, Gov. Voinovich wrote The Most Reverend Anthony Pilla, the Bishop of the Roman Catholic Diocese of Cleveland, on April 18, 1991, to encourage him to order the Roman Catholic schools in the Cleveland Diocese to agree to participate in Ohio proficiency examinations and reminded Bishop Pilla that David Brennan and he, the Governor of Ohio, "...have begun to organize a committee which will put together an effort to get Ohio to seriously look at a voucher system,"[15] Later in this letter, Gov. Voinovich stated to Bishop Pilla: "I think the Catholic schools would do extremely well on the proficiency test, which would underscore your excellence and make it easier for us to promote the voucher system." The Catholic schools of the Diocese of Cleveland, located only in the "inner city" of Cleveland, became most of the 84 percent of the total private religious schools that participated in the ultimately enacted statutory Ohio Scholarship Program, viz. the school vouchers program.

On July 18, 1991, the Most Reverend Daniel E. Pilarczyk, Archbishop of the Diocese of Cincinnati, wrote Gov. Voinovich and included "...a list of names submitted by the six Latin Rite Bishops of Ohio for your [Gov. Voinovich] consideration for appointment to the Governor's Committee on Choice."[16] Archbishop Pilarczyk concluded in his letter, "[I]f there is anything more that we can do at this time to promote real choice in education, please do not hesitate to contact us." On that same July 18th, Gov. Voinovich wrote his friend, David L. Brennan of Akron, Ohio, advising him that he, Gov. Voinovich, is having faxed "...the list of names to you [Mr. Brennan] which were

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[15] See Page 29 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[16] See Page 30 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

provided to me [Gov. Voinovich] by Daniel E. Pilarczyk, Archbishop of Cincinnati."[17] Gov. Voinovich wrote Archbishop Pilarczyk on July 26, 1991, thanking him "...for the list of names you submitted from the six Latin Rite Bishops of Ohio[,]" reporting that he, Gov. Voinovich, "...sent those names to David Brennan, who is heading up the Governor's Committee on Choice."[18] Gov. Voinovich concluded in this letter that "...I will be in touch with ..." Bishop Pilarczyk in the very near future concerning the agenda of the Governor's Committee on Choice.

During the following month, Archbishop Pilarczyk wrote Gov. Voinovich on August 27, 1993, advising him of the Ohio bishops' "...role in the proposed Ohio Scholarship legislation."[19] Archbishop Pilarczyk stated that he and his fellow Ohio Catholic bishops "...decided that, as Catholic Conference of Ohio, we would adopt a low profile position on this bill. Conference staff will formally testify in support of the legislation but will not actively lobby for its passage." Archbishop Pilarczyk stated in the next paragraph of his August 27th letter how the Ohio Catholic bishops would lobby the Ohio legislators in the "low profile" manner.

> We believe, however, that parent organizations in each diocese will play a very active role in lobbying for its passage. I am sure they will organize a strong grassroots effort within each legislative district to influence the outcome of this controversial issue. We will encourage this effort.[20]

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[17] See Page 31 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[18] See Page 32 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[19] See Page 33 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[20] Id.

OPEARL directs this Court's attention to another factual situation of excessive government entanglement with religion between Gov. Voinovich and the Ohio Catholic bishops that is manifested in the March 21, 1994, letter from Archbishop Pilarczyk to Gov. Voinovich. Archbishop Pilarczyk stated the following in the third paragraph of that letter.

> You will recall that in our telephone conversation on October 29, 1993, you suggested that it would be helpful if the Conference would take a neutral position on the Ohio Scholarship bill. In return you indicated a willingness to consider additional assistance for our students.[21]

Following up Gov. Voinovich's above quid pro quo agreement with the Ohio Catholic bishops, Gov. Voinovich did meet with the Catholic bishops on June 7, 1994, for the purpose of discussing, inter alia, a requested substantial increase in public funding for the administrative cost reimbursement to Ohio Catholic schools relative to these religious schools reporting of compliance with state regulations.[22] The Ohio legislature and Gov. Voinovich did, in fact, appropriate this particular per pupil public funding increase at the Catholic bishops requested rate of 100 percent per pupil.[23]

Another item on the agenda for the above June 7th meeting was the discussion with the Ohio Catholic bishops of

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[21] See Page 34 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[22] See Pages 38 through 45 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[23] See Page 78 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

school voucher legislation and the role that these bishops will perform during the legislative process.[24]

Another factual example of excessive government entanglement with religion between the Ohio Catholic Conference, whose leadership is the Ohio Catholic bishops, and Gov. Voinovich is disclosed in the last sentence of the fourth paragraph of Gov. Voinovich's May 21, 1994, letter to Mr. Brennan. "We shouldn't tinker too much with what has already been agreed to by the CC [Catholic Conference], although your idea of not doing it in all 12 grades to begin with may very well be a good one."[25] The pronoun "it" in this quoted sentence refers to the Ohio Scholarship Program. Also, Governor Voinovich is referring to his spouse, Janet Voinovich, in the second last paragraph of this May 31st letter when he asks for Mr. Brennan to send his "...correspondence on these matters directly in c/o Janet, so I am sure to receive the mail without it going through a dozen hands."[26] Gov Voinovich's recommended position with the bishops of the Catholic Conference on school vouchers was expressed almost three weeks before his above meeting with them.

During February and March of 1995, Archbishop Pilarczyk, on behalf of the Ohio Catholic Conference, and Gov. Voinovich exchanged correspondence pertaining to the details for lobbying Ohio legislators to obtain the successful enactment of their prior quid pro quo agreement , including the preserving of the increases in the administrative cost reimbursement and the auxiliary services programs for the Ohio Catholic schools.[27]

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[24] See Pages 44 and 45 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

[25] See Page 37 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[26] Id.

[27] See Pages 46, 47 and 48 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

On May 23, 1995, Gov. Voinovich wrote Bishop Pilla, informing the Cleveland Catholic leader that, in the opinion of the governor, the Ohio legislature will approve and enact as part of Ohio's biennial budget, effective July 1, 1995, the increases in auxiliary services and reimbursement for administrative costs to Ohio's Catholic schools. Gov. Voinovich then advised Bishop Pilla: "We are also working very, very hard to keep the voucher language in the budget which specifically mandates that Cleveland have the voucher experiment. Anything you can do to help us in that regard would also be appreciated."[28]

The six bishops of the Ohio Catholic Conference and Gov. Voinovich exchanged letters during late June and early July of 1995 wherein the Catholic bishops and the governor expressed their gratitude to each other for the successful inclusion in the new biennial budget of the promised and agreed public funding increases to nonpublic school pupils, which, of course, includes Ohio Catholic school pupils.[29] The statutory Ohio Scholarship Plan and its $5.5 million public funds appropriation for only the City of Cleveland was also included in this biennial budget as evidenced by Gov. Voinovich's September 20, 1995, letter and his referenced enclosure to the Most Reverend James Hickey, Archbishop of Washington, D. C.[30]

On November 16, 1995, Gov. Voinovich gave a speech in Cleveland to publicly introduce the school voucher program to be conducted in that city and to publicly announce his reasons why he supports the "Cleveland

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[28] See Page 49 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[29] See Pages 50, 51 and 52 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[30] See Pages 53 and 54 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

Scholarship and Tutoring Program."[31] However, it is interesting to note that Gov. Voinovich crossed out the following prepared written sentence from his speech. "Scholarships will be offered to all eligible students in the district, including mainstreamed and separately educated, handicapped students."[32] OPEARL submits that this action by Gov. Voinovich in the middle of November 1995 certainly conflicts with some of the argument offered over the last six years by the Petitioners for maintaining this unconstitutional school voucher program, i. e., this voucher program is to be available to inner city at risk low income children, regardless of their academic and/or physical disability.[33]

Gov. Voinovich wrote His Eminence John Cardinal O'Connor, Archbishop of New York, on October 16, 1996, informing Cardinal O'Connor, "On a per pupil basis, no state in the nation provides greater support for its private school students than Ohio."[34] The governor concluded his letter by urging the archbishop of New York to encourage his state legislature to provide more public funds to nonpublic schools in his state, including his diocese's Catholic schools.[35]

Six months later, Gov. Voinovich wrote Bishop Pilla on April 21, 1997, encouraging him, as the then President of the U. S. Catholic Conference of Bishops, to persuade the bishops of this country to explore "...how they can increase

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[31] See Pages 55 through 63 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court.

[32] See Pages 57 and 81 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

[33] See Pages 81 and 82 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

[34] See Page 64 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

[35] See Page 65 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

the support (i. e., public support) of our non-public schools throughout this country."[36] However, Gov. Voinovich does assure Bishop Pilla that, notwithstanding his suggestion, he is not backing away from continuing to publicly support the Cleveland school voucher program.

The Cleveland Scholarship Program resulted in exceeding its budgeted amount by millions of dollars, primarily because of the costs of transportation of the students, beginning with the 1996-97 school year.[37] One of the recommendations made by the governor's assistant, Tom Needles, to try and reduce this student transportation cost was to change one of the eligibility rules for the scholarship applicants. Needles suggested to the governor that the change in the school choice rule would be that the applicant-student's options would be limited to a private sectarian or nonsectarian school where the student could either walk or take the bus.[38] Therefore, the applicant-student would no longer have the choice of applying to a private religious or nonsectarian school that would require another means of transportation to be provided other than a bus. This is another example of excessive government entanglement with religion in connection with the administration of this Scholarship Program.

On May 27, 1999, the Ohio Supreme Court ruled the Ohio Scholarship Program, enacted in 1995, unconstitutional because it was enacted as part of the 1995-97 biennial appropriations bill in violation of Ohio's constitutional "single subject" rule. Simmons-Harris v. Goff (1999), 86 Ohio St.3d 1, 711 N.E.2d 203. Gov. Voinovich, through his

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[36] See Page 66 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

[37] See Pages 67 and 68 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

[38] See Pages 69 and 70 of the Lodging filed by Amicus Curiae, OPEARL, with the Clerk of this Court

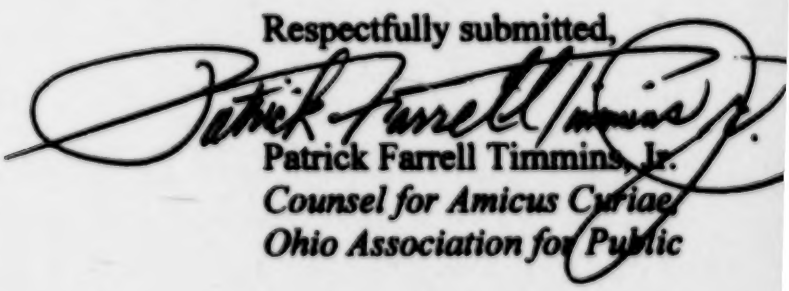
sponsors, immediately submitted, in essence, the identical school voucher program as a separate bill. This same Scholarship Program again passed in both houses of the Ohio Legislature and was signed into law, effective June 29, 1999.

CONCLUSION

The statutory Ohio Scholarship Program in question, which was enacted on June 29, 1999, fails two of the three prongs of the *Lemon* Test. The record compiled by the Petitioners and the Respondents clearly establishes that this school voucher program results in having the effect of an endorsement of religion by the government, thereby failing the second prong of the *Lemon* Test. The public records in the Lodging of OPEARL compellingly prove this Scholarship Program creates an excessive government entanglement with religion, thus failing the third prong of the *Lemon* Test. Because this Ohio statutory school voucher program has failed these two prongs of the Lemon Test, which is the constitutional review for the Federal Establishment Clause contained in the First Amendment, the Ohio statutes in question are unconstitutional because they are in violation of the First Amendment to the United States Constitution.

Accordingly, OPEARL urges this Court to affirm the decision and judgment rendered in these cases by the Sixth Circuit Court of Appeals and remand these cases to the United States District Court for the Northern District of Ohio, Eastern Division, for enforcement of this affirmed judgment.

Respectfully submitted,



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